U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 28582860

Date: NOV. 9, 2023

Appeal of Nebraska Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (National Interest Waiver)

The Petitioner, a nurse, seeks classification as an individual of exceptional ability. *See* Immigration and Nationality Act (the Act) section 203(b)(2), 8 U.S.C. § 1153(b)(2). The Petitioner also seeks a national interest waiver of the job offer requirement that is attached to this EB-2 immigrant classification. *See* section 203(b)(2)(B)(i) of the Act, 8 U.S.C. § 1153(b)(2)(B)(i). U.S. Citizenship and Immigration Services (USCIS) may grant this discretionary waiver of the required job offer, and thus of a labor certification, when it is in the national interest to do so.

The Director of the Nebraska Service Center denied the petition, concluding that the Petitioner did not establish that she qualifies as an individual of exceptional ability and, therefore, the issue of qualifying for a national interest waiver was moot to the petition's decisional outcome. The matter is now before us on appeal. 8 C.F.R. § 103.3.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal.

To establish eligibility for a national interest waiver, a petitioner must first demonstrate qualification for the underlying EB-2 visa classification, which in this case, is claimed as an individual of exceptional ability in the sciences, arts, or business. Section 203(b)(2)(B)(i) of the Act. Exceptional ability in the sciences, arts, or business means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. 8 C.F.R. § 204.5(k)(2). In addition, the regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth the specific evidentiary requirements for demonstrating eligibility as an individual of exceptional ability. A petitioner must submit documentation that satisfies at least three of the six categories of evidence listed at 8 C.F.R. § 204.5(k)(3)(ii). However, meeting the minimum requirements by providing at least three types of initial evidence does not, in itself, establish that the individual in fact meets the requirements for exceptional ability. *See generally* 6 *USCIS Policy Manual* F.5(B)(2), https://www.uscis.gov/policymanual. In the second part of the analysis, officers should evaluate the evidence together when considering the petition in its entirety for the final merits determination. *Id*. The officer must determine whether the petitioner, by a preponderance of the

evidence, has demonstrated a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. *Id.*

If a petitioner demonstrates eligibility for the underlying EB-2 classification, they must then demonstrate they merit a discretionary waiver of the job offer requirement "in the national interest." Section 203(b)(2)(B)(i) of the Act. *Matter of Dhanasar*, 26 I&N Dec. 884, 889 (AAO 2016) provides that USCIS may, as matter of discretion,[1] grant a national interest waiver if the petitioner shows:

- The proposed endeavor has both substantial merit and national importance;
- The individual is well-positioned to advance their proposed endeavor; and
- On balance, waiving the job offer requirement would benefit the United States.

The Director determined that the Petitioner met at least three out of six criteria listed at 8 C.F.R. § 204.5(k)(3)(ii) and conducted a final merits determination. The Director acknowledged the Petitioner's experience, including her educational credentials, professional license, and membership in a professional association, but determined the record lacked evidence that the Petitioner's professional achievements set her apart from other nurses in the industry to show a degree of expertise significantly above that ordinarily encountered in her field as required to establish exceptional ability. Because the Petitioner did not establish her eligibility for the underlying EB-2 classification, the Director deemed the issue of whether she qualifies for a national interest waiver moot and denied the petition, concluding that the Petitioner did not establish eligibility for the benefit sought.

On appeal, the Petitioner asserts that the Director erred by stating in a request for evidence (RFE) that the Petitioner met at least three of the six initial categories of evidence but ultimately concluding in the denial that the Petitioner was not an individual of exceptional ability. The Petitioner asserts that pursuant to the USCIS Policy Manual, a follow-up RFE should have been issued prior to the petition's denial and the Director's failure to do so constituted clear error.

Upon review, we find the Petitioner's arguments misplaced. The USCIS Policy Manual states that USCIS has the discretion to deny a benefit request without issuing an RFE. *See generally* 1 *USCIS Policy Manual* E.6(F), https://www.uscis.gov/policymanual; *see also* 8 C.F.R. § 103.2(b)(8)(ii). The USCIS Policy Manual further states, "If the officer determines a benefit request does not have any legal basis for approval, the officer should issue a denial without prior issuance of an RFE or NOID." *Id.* at E.6(F).

In this matter, the Director issued an RFE that specifically identified the legal and evidentiary requirements of the immigrant classification that the Petitioner seeks, and noted that the Petitioner had satisfied the initial evidence requirements for classification as an individual of exceptional ability. As noted above, and as clearly stated both in the Director's RFE and in the denial, meeting the minimum requirements by providing at least three types of initial evidence is not sufficient to establish that the Petitioner is an individual of exceptional ability, but instead is only the first step. *See generally* 6 *USCIS Policy Manual*, *supra*, at F.5(B)(2). Here, the second step of the process is based on a comprehensive qualitative analysis of the evidence. The Director concluded in a final merits

[1] *See also Poursina v. USCIS*, 936 F.3d 868 (9th Cir. 2019) (finding USCIS' decision to grant or deny a national interest waiver to be discretionary in nature).

determination that the Petitioner did not establish by a preponderance of the evidence that she has achieved a degree of expertise that is significantly above that ordinarily encountered in the sciences, arts, or business. *See id.*

On appeal, the Petitioner does not address the Director's final merits determination analysis and instead claims that she was not afforded the opportunity "to address eventual insufficiencies" in her application due to the Director's failure to issue a follow-up RFE. The regulation at 8 C.F.R. § 103.2(b)(8), however, clearly states that "[i]f the record evidence establishes ineligibility, the benefit request will be denied on that basis." Where evidence of record indicates that a basic element of eligibility has not been met, it is appropriate for the Director to deny the petition without an RFE.

As noted, the Petitioner does not address the Director's final merits determination in her appellate submission. When dismissing an appeal, we generally do not address issues that were not raised with specificity on appeal. Issues or claims that are not raised on appeal are deemed to be ""waived."[2] Since the Petitioner did not address this issue with specificity on appeal, we deem the issue waived and conclude the Petitioner has not established that she qualifies for classification as an individual of exceptional ability.

Accordingly, we adopt and affirm the Director's decision regarding their discussion of exceptional ability and the final merits. *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994); *see also Giday v. INS*, 113 F.3d 230, 234 (D.C. Cir. 1997) (noting that the practice of adopting and affirming the decision below has been "universally accepted by every other circuit that has squarely confronted the issue"); *Chen v. INS*, 87 F.3d 5, 8 (1st Cir. 1996) (joining eight circuit courts in holding that appellate adjudicators may adopt and affirm the decision below as long as they give "individualized consideration" to the case).

As the Petitioner has not established the threshold requirement of eligibility for the EB-2 classification, analyzing her eligibility for a national interest waiver under the *Dhanasar* framework is unnecessary.

ORDER: The appeal is dismissed.

[2] *See, e.g., Matter of M-A-S-*, 24 I&N Dec. 762, 767 n.2 (BIA 2009). The courts' view of issue waiver varies from circuit to circuit. *See Rizk v. Holder*, 629 F.3d 1083, 1091 n.3 (9th Cir. 2011) (finding that issues not raised in a brief are deemed waived); *Martinez-Serrano v. INS*, 94 F.3d 1256, 1259 (9th Cir. 1996) (finding that an issue referred to in an affected party's statement of the case but not discussed in the body of the brief is deemed waived); *but see Hoxha v. Holder*, 559 F.3d 157, 163 (3d Cir. 2009) (issue raised in notice of appeal form is not waived, despite failure to address in the brief).